90-1295

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

William A. Cohn, Petitioner

v.

Ralph Shankman, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

Richard A. Gordon
Koger Center, Suite 300
65 Germantown Court
Cordova, Tennessee 38018

Attorney for Petitioner

QUESTION PRESENTED

Whether a trial court that contemplates sua sponte imposition of Rule 11 sanctions against a litigant must give notice to the litigant that sanctions will possibly be imposed and provide the litigant with a meaningful opportunity to be heard.

TABLE OF CONTENTS

Page

Opinions Below..... 2

Jurisdiction..... 2

Constitutional and Statutory Provisions Involved..... 3

Statement of Case..... 5

Reasons for Granting Writ..... 10

Conclusion..... 23

Appendices

Memorandum Opinion of the Chancery Court of Shelby County, Tennessee at Memphis (October 17, 1988).....Appendix I

Final Decree of Absolute Divorce (October 31, 1988).....Appendix II

Opinion of the Court of Appeals of Tennessee (July 12, 1990).....Appendix III

Order of the Court of Appeals
of Tennessee (July 12,
1990).....Appendix IV
Order of the Supreme Court
of Tennessee (November 19,
1990).....Appendix V

TABLE OF AUTHORITIES

Page

Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965)..... 15

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971)..... 14

Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871)..... 15

Cotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986)..... 12

Donaldson v. Clark, 810 F.2d 1551 (11th Cir. 1987)..... 22

Eash v. Riggins, 757 F.2d 557 (3d Cir. 1985)..... 18

In re Endrex Investments, Inc., 111 B.R. 939 (D.C. 1990)..... 22

Goings v. AETNA Cas. & Sur. Co., 491 S.W.2d 847 (Tenn. App. 1972)..... 13

Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc., 834 F.2d 833 (9th Cir. 1987)..... 21

Harmony Drilling Co., Inc. v. Kruetter, 846 F.2d 17 (5th Cir. 1988)..... 21

Jensen v. Federal Land Bank of Omaha, 882 F.2d 340 (8th Cir. 1989)..... 22

Knorr Brake Co. v. Harbil Co., 738 F.2d 223 (7th Cir. 1984)..... 18

McLaughlin v. Bradlee, 803 F.2d 1197 (D.C. Cir. 1986)..... 12

Miranda v. Southern Pacific Transp. Co., 710 F.2d 516 (9th Cir. 1983)..... 18

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed.2d 865 (1950)..... 14

Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986)..... 20

Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S. Ct. 2455, 65 L.Ed.2d 488 (1980)..... 17

Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1985)..... 20

Sanko S.S. Co., Ltd. v. Galin, 835 F.2d 51 (2d Cir. 1987)..... 23

T.W. Elec. Service, Inc. v. Pacific Electric Contractors, 809 F.2d 626 (9th Cir. 1987)..... 17

Westmoreland v. CBS, 770 F.2d 1168 (D.C. Cir. 1985)..... 11

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William A. Cohn, Petitioner

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Ralph Shankman, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William A. Cohn, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above-entitled case on November 19, 1990.

OPINIONS BELOW

The Supreme Court of Tennessee denied Petitioner's appeal on November 19, 1990, without issuing an opinion. Petitioner seeks a review of this final order, which is attached hereto at Appendix V, infra. The opinion of the Court of Appeals of Tennessee, rendered on July 12, 1990, is attached hereto at Appendix III, infra. The order of the Court of Appeals of Tennessee is at Appendix IV. The memorandum opinion of the trial court, the Chancery Court of Shelby County, Tennessee, dated October 17, 1988, is attached hereto at Appendix I, infra, along with the trial court's Final Decree of Absolute Divorce, at Appendix II.

JURISDICTION

The final order of the Supreme Court of Tennessee was entered on November 19, 1991 (Appendix V). The jurisdiction of the

Supreme Court of the United States is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also, this case involves Rule 11 of the Tennessee Rules of Civil Procedure, pursuant

to which the trial court apparently imposed sanctions on the Petitioner. Rule 11 provides as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,

> and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11 of the Tennessee Rules of Civil Procedure is virtually identical to its Federal court counterpart.

STATEMENT OF THE CASE

The constitutional question before the Court arises out of a divorce case filed in the Chancery Court of Shelby County, Tennessee, on November 2, 1987, by Leslie Ann Shankman Cohn against the Petitioner,

William Allan Cohn. Petitioner answered the complaint for divorce and filed a petition for custody of the couple's children and third-party complaint against his wife's father, Ralph Shankman (or "Respondent"), seeking injunctive relief to protect their children from being endangered by potentially harmful personal contact with Respondent. In his answer to Petitioner's third-party complaint, Respondent included a general prayer for relief seeking awardance of attorney's fees.

At trial, proof was presented that Respondent had reason to believe that he had contracted the complex of diseases commonly known as Acquired Immunity Deficiency Syndrome ("AIDS"). During the marriage of the Cohns, Mr. Cohn had closely supervised all contacts between their children and Respondent. Notwithstanding this proof, the trial judge found that the third-party complaint filed against Respondent was

"frivolous, had no basis in law or fact, was malicious in nature and would be subject to Rule 11 sanctions" (Trial Court's Memorandum, Appendix I, p. 3; Final Decree of Divorce, Appendix II, p. 3). Petitioner had not been given notice that the trial judge was considering a sua sponte imposition of sanctions under Rule 11 of the Tennessee Rules of Civil Procedure. There was no hearing to determine whether there was a basis for Rule 11 sanctions. The trial judge refused Petitioner's request for a hearing on the issue of Rule 11 sanctions and ordered Petitioner to pay Shankman attorney's fees of $5,000. Petitioner unsuccessfully argued before the trial court that "There is no authority" for this award of attorney's fees "either in law or in equity." Trial Transcript, Vol. IX, p. 77.

Petitioner appealed the trial court's final decree to the Court of Appeals of Tennessee. Petitioner raised the instant

federal question regarding violation of his due process rights in his Brief filed with the Court of Appeals on December 12, 1989. Specifically, Petitioner argued to the Court of Appeals that "any award of attorney's fees in the nature of a Rule 11 motion would be unconstitutional, in violation of the Fourteenth Amendment to the United States Constitution in that the fees were awarded without proper notice and without a hearing on the issues" (Petitioner's Appellate Brief, p. 36). On July 12, 1990, the Court of Appeals of Tennessee held that Petitioner was on notice that Respondent had requested relief "in the nature of a Rule 11 sanction" and that a court may "upon its own initiative" impose such sanctions (See Appendix III hereto, Opinion of the Court of Appeals of Tennessee, pp. 13-14). The Court of Appeals did not speak to the issue of the trial court's failure to provide an

opportunity for a hearing on the Rule 11 sanctions.

On or about September 11, 1990, Petitioner applied to the Supreme Court of Tennessee for permission to appeal the decision of the Court of Appeals with respect to the trial court's order to pay all or part of Respondent's attorney's fees. In said application, Petitioner pointed out that he "had not been placed on notice that T.C.R.P., Rule 11 sanctions were being considered, that the husband had not been afforded a hearing on contemplated sanctions" and that "he had not been given the opportunity to show what facts and evidence constituted the basis for his [third-party complaint]." Petitioner further argued that this failure to set a hearing "to specifically consider sanctions under T.C.R.P., Rule 11. . .denied his due process rights under the 5th and 14th Amendments to the United States

Constitution" (Petitioner's Application to the Supreme Court for Permission to Appeal, p. 4).

REASONS FOR GRANTING WRIT

Rule 11 of the Tennessee Rules of Civil Procedure (and the Federal Rules of Civil Procedure) essentially provides that the signature of an attorney on a pleading, motion or other paper constitutes a certificate by him that he has read the pleading and that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the modification or reversal of existing law and is not interposed for any improper purpose. Tenn. R. Civ. P. 11. If a pleading is signed in violation of the rule the court shall impose an appropriate sanction upon the person who signed it, a

represented party, or both. Id. These sanctions may include an order to pay the other party's expenses, including attorney's fees, incurred because of the filing of the pleading.

The word "sanctions" in the caption stresses the deterrent orientation of Rule 11. See Westmoreland v. CBS, 770 F.2d 1168, 1170 (D.C. Cir. 1985) (dual purpose of deterrence and punishment). It is designed to curb dilatory or abusive tactics and to streamline the litigation process by lessening frivolous claims or defenses. Fed. R. Civ. P. 11, advisory committee note. While Rule 11 provides for mandatory imposition of sanctions where a pleading is signed which is not well grounded in fact and warranted by existing law, the Fourteenth Amendment of the United States Constitution requires due process of law before a state deprives a person of life, liberty or property. The federal circuit

courts are noticeably divided over the procedure which is due a person who is subject to Rule 11 sanctions. To date, the schemes followed by the courts have ranged from a full contempt-like evidentiary hearing to no hearing at all. Compare Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986) (where fine is imposed for violation of Rule 11, court must follow the procedure required in criminal contempt proceedings) with McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986) (plaintiff not entitled to hearing on whether sanctions should be levied or on their amount). This Honorable Court has never ruled on the appropriate procedures required for imposition of Rule 11 sanctions. In the absence of such procedural guidelines, Rule 11 is generating a large amount of "satellite" litigation, an undesirable result in view of its objective, to streamline the litigation process.

In this case, Respondent prayed for attorney's fees in his answer to Petitioner's Third-Party Complaint. Tennessee adheres to the "American Rule" that in the absence of a statutory provision or contractual agreement between the parties, attorney fees incurred by a plaintiff in recovering a judgment for damages is not a proper element of damages. Goings v. AETNA Cas. & Sur. Co., 491 S.W.2d 847 (Tenn. App. 1972). The trial court, sua sponte, issued an order, apparently pursuant to Rule 11, requiring Petitioner to pay Respondent $5,000 as "reasonable attorney's fees." Petitioner respectfully contends that he should have been placed on notice of the trial judge's consideration of Rule 11 sanctions and should have afforded him a meaningful opportunity to be heard. Given notice and an opportunity to be heard in camera Petitioner would have explained his conduct and would have presented proof of

facts and circumstances, from privileged files, work product, and otherwise, which, while not necessarily relevant to the issues at trial, would have shown that Petitioner's third-party complaint had a solid basis in both fact and law.

It is well-established that the Due Process Clause requires at a minimum that deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 94 L.Ed. 865 (1950). Absent extraordinary circumstances, procedural due process requires notice and hearing before any governmental deprivation of a significant property interest. Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971). The fundamental requisite of due process of law is the opportunity to be heard. Id. at 314 (citing Grannis v.

Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L.Ed. 1363 (1914) While due process does not always require a full blown evidentiary hearing, the Constitution does require "an opportunity . . . granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965). The fact that the party or attorney is generally sanctioned for acts done in a judicial proceeding is irrelevant in determining whether due process must be afforded. As this Court stated in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354-55 (1871), a case concerning the disbarment of an attorney:

> [E]xcept where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule

> of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real or personal property.

The advisory committee's comments to Federal Rule 11 make it clear that the issuance of sanctions "obviously must comport with due process requirements." These same comments suggest limiting the scope of sanction proceedings so that the efficiencies achieved through Rule 11 efficiencies will not be offset by the cost of satellite litigation. The targets of judicial sanctions, however, undeniably possess due process rights which should not be trampled by the specter of satellite litigation. In any event, the absence of articulated due process procedures which must precede Rule 11 sanctions actually creates a risk of an increase in litigation relating to one's due process rights.

In the instant case, the Petitioner, although a licensed attorney in the State of Tennessee, was represented by counsel throughout the proceedings and at no time did the Petitioner sign any pleading as an attorney. Although sanctions were imposed on the Petitioner as a party litigant, none were imposed on his counsel. With respect to imposition of a penalty upon attorneys, this Court has cautioned that like "other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S. Ct. 2455, 65 L.Ed.2d 488 (1980). The federal circuit courts of appeals have often required notice and an opportunity to be heard in sanctioning attorneys pursuant to authorities other than Rule 11. See T.W. Elec. Service, Inc. v. Pacific Electric Contractors, 809 F.2d 626, 638 (9th Cir.

1987) ("notice and a hearing should precede imposition of a sanction under [28 U.S.C.] § 1927"); Braley v. Campbell, 832 F.2d 1504, 1514 (10th Cir. 1987) (when court acts sua sponte the basic requirements of due process with respect to the assessment of costs, expenses or attorney's fees are notice that such sanctions are being considered by the court and subsequent opportunity to respond); Eash v. Riggins Trucking, Inc., 757 F.2d 557, 571 (3d Cir. 1985) (as a general practice a monetary detriment should not be imposed by a court without prior notice and an opportunity to respond); Knorr Brake Co. v. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984) (a court should provide counsel with some opportunity to be heard before assessing attorney's fees under 28 U.S.C. § 1927); Miranda v. Southern Pacific Transp. Co., 710 F.2d 516, 522 (9th Cir. 1983) (due process requires opportunity to prepare defense and explain questionable

conduct at a hearing). In Miranda, the court observed that affording attorneys procedural protection such as notice and an opportunity to be heard will safeguard due process rights by guaranteeing that:

> (1) the attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorney's explanation for their conduct; and (3) the facts supporting the sanction will appear in the record, facilitating appellate review.

710 F.2d at 522-23.

Similarly, the federal courts of appeals may not impose monetary penalties or take other disciplinary action for an attorney's failure to comply with its orders or rules until "after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested. . ." Fed. R. App. P. 46(c).

Since the 1983 amendments to Rule 11 providing for mandatory imposition of sanctions if a pleading is signed in violation of the rule,[1] the federal courts of appeals have differed greatly in their approach to the question of what procedure is due counsel or a party prior to imposing sanctions. In Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 205-06 (7th Cir. 1985), the court held that a hearing on Rule 11 sanctions "would have served no useful purpose" where the trial court assessed sanctions for filing a complaint insufficient in several areas as a matter of law and the trial court has not based the sanctions on a finding of bad faith. In Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d

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[1]While Rule 11 deals with the signing of particular papers in violation of the implicit certification invoked by the signature, 28 U.S.C. § 1927, by contrast, imposes a continuing prohibition against dilatory litigation.

Cir. 1986) the court held that no hearing is required where "the judge's participation in the proceedings provided him with full knowledge of the relevant facts." See also Harmony Drilling Co., Inc. v. Kreutter, 846 F.2d 17, 19 (5th Cir. 1988) (district courts need not, in all cases, give the offending party notice of Rule 11 violation before applying sanctions).

On the other hand, several circuit courts of appeals have required a higher degree of procedural due process safeguards when imposing Rule 11 sanctions. In Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc., 834 F.2d 833 (9th Cir. 1987), the court held that imposition of Rule 11 sanctions without affording prior notice and a meaningful opportunity to be heard was in violation of the due process clause. 834 F.2d at 836. The court noted the distinction between general notice of the presence of Rule 11 (which does not

constitute sufficient notice) and specific notice that sanctions are actually being considered by the court. Id., n.5. In Jensen v. Federal Land Bank of Omaha, 882 F.2d 340 (8th Cir. 1989), the court held that failure to give notice to an attorney that Rule 11 sanctions were being considered against him and to provide an opportunity for a hearing violated his constitutional due process rights. 882 F.2d at 341. See also Donaldson v. Clark, 810 F.2d 1551, 1560 (11th Cir. 1987) (en banc) (specific notice required if sanctions are to be imposed on client; accused must be given opportunity to respond to the invocation of Rule 11 and to justify his or her actions); In re Endrex Investments, Inc., 111 B.R. 939, 943-44 (D.C. 1990) (debtor entitled to adequate notice and opportunity to respond before sanctions awarded). Moreover, interestingly, the Second Circuit has issued an opinion which is seemingly inconsistent

with Oliveri. In Sanko S.S. Co. Ltd. v. Galin, 835 F.2d 51 (2d Cir. 1987), the court held that the district court did not comport with due process where it imposed Rule 11 sanctions sua sponte but failed to provide the attorney with notice and an opportunity to be heard. 835 F.2d at 53.

In the present case, Petitioner, a litigant represented at trial at all times by counsel, respectfully submits that the absence of notice that the trial court was considering sanctions and denial of an opportunity to be heard are violations of the due process clause of the United States Constitution.

Adequate notice and an opportunity to be heard should be afforded as a matter of fundamental fairness to supply the attorney or litigant with the particulars upon which to base his defense and to explain his questionable conduct, to give a judge adequate time to consider the severity of

the proposed sanction in light of the attorney's or litigant's explanation and his ability to pay, and so that facts concerning the notice and hearing may be set forth in the record, thereby facilitating meaningful appellate review.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Tennessee in Cohn v. Shankman.

Respectfully submitted,

Richard A. Gordon

PROOF OF SERVICE

I, Richard A. Gordon, counsel for Petitioner, hereby certify that I have served counsel for all parties in this cause, Mr. Henry Klein, Esquire, 770 Estate Place, Memphis, Tennessee, 38137, and Don L. Dowden, Esquire, 5100 Poplar, Suite 2622, Memphis, Tennessee, 38137, with three copies of this Petition for Writ of Certiorari both by means of United States Mail, first class, postage prepaid, this 15th day of February, 1991.

Richard A. Gordon
Koger Center, Suite 300
65 Germantown Court
Cordova, Tennessee 38018

Attorney for Petitioner

APPENDICES

OPINIONS BELOW

Memorandum Opinion of the Chancery Court of Shelby County, Tennessee at Memphis (October 17, 1988).....Appendix I

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Order of the Court of Appeals of Tennessee (July 12, 1990).....Appendix IV

Order of the Supreme Court of Tennessee (November 19, 1990).....Appendix V

APPENDIX I

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE AT MEMPHIS

LESLIE ANN COHN	)	
	)	
vs.	)	NO. D 15875-2
	)	
WILLIAM ALLAN COHN	)	

MEMORANDUM

This cause came on for hearing on the 25th day of August, 1988 before the Honorable Muriel Robinson, Judge Of the Fourth Circuit Court of Davidson County, Tennessee sitting by designation of the Supreme Court for these proceedings. The matter was heard upon the original complaint for divorce filed by the plaintiff-wife, Leslie Ann Cohn, personal service of process had upon the defendant-husband, William Allan Cohn, answer filed by said defendant, and petition for custody filed by the defendant-husband.

In addition there were various motions filed with the Court and a third party

complaint against the maternal grandfather of the minor children, to wit, Mr. Ralph S. Shankman with answer filed thereto. The matter was heard in open court with testimony of the principals, other witnesses, argument of counsel submitted to the Court by post-trial written memorandum of each counsel dated September 14, 1988 and September 27, 1988 respectively, and the entire record in this cause including a petition for contempt and sanctions filed against the plaintiff-wife by defendant-husband. From all of which the Court finds as follows:

I.

That all pending motions in this cause are hereby dismissed for failure of movant to set the same for hearing except as specified hereafter. The Petition for Contempt and Motion for sanctions and Rule 11 Motion filed against the wife by the

husband are dismissed. The proof presented in these matters do not substantiate a finding of contempt. Further the petition , filed against the third party defendant, Mr. Ralph S. Shankman, is hereby dismissed at the cost of the husband. The Court feels the above petition was frivolous, had no basis in fact or law, was malicious in nature and would be subject to Rule 11 sanctions. Therefore, as this pleading was authorized by the husband, William Allan Cohn, being a member of the bar and signed by him the Court orders that he shall pay a reasonable attorneys fee to Mr. Shankman's attorney of record in the amount of five thousand dollars ($5,000.00).

II.

The Court finds having reviewed all the evidence, finds that a divorce should be awarded in this matter. Therefore the wife, Leslie Ann Shankman Cohn, shall be awarded an absolute divorce from the defendant-

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husband, William Allan Cohn, upon the grounds of cruel and inhuman treatment and adultery and she is hereby restored to all the rights and privileges of an unmarried person.

III.

This Court further finds that it is to the best interest and welfare of the three minor children of these parties, to wit, Aerial Moshe Cohn, Aaron Jacob Cohn and Barbara Sharon Cohn, that their custody be awarded to the complainant and natural mother, Leslie Ann Shankman Cohn. The defendant father shall be awarded reasonable visitation as follows: every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. and Wednesday afternoon of each week from 5:00 p.m. to 8:30 p.m.

The parties shall alternate the children's spring vacation each year and shall alternate all the Jewish holidays and

other holidays. The maternal grandparent, Ralph S. Shankman, shall be entitled to see and visit and have with him his grandchildren in compliance with the grandparent visitation provisions of T.C.A. - 36-6-201 with said visits during the time the children are in the care of the mother.

The father shall have extended summer visitation with the children for the month of July and the first two weeks of August each summer. The mother shall visit the middle weekend of July and every other Wednesday night during this summer visit.

Each party is allowed to phone the children at reasonable times and places but are warned not to make a nuisance of themselves in this regard. The parties are ordered to conduct themselves properly during phone conversations and shall treat each other with respect and politeness so

that their children will not be subjected to further trauma.

The Court feels it is necessary to enjoin and restrain the parties herein from attempting to alienate the affections of these children from the other and each parent is further enjoined from making any derogatory remarks about each other or family friends or relatives in the presence of the children.

IV.

The father shall pay to the mother the sum of one thousand five hundred dollars ($1,500.00) per month as child support for the maintenance of the minor children. Said amount shall not be reduced or pro rated without approval of the Court. For the month of July during the extended summer visitation the child support amount shall be reduced to seven hundred fifty dollars ($750.00) however the full amount shall be

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paid for the month of August. The father shall be allowed to claim the two older children as dependents and the mother will be allowed to claim the younger child as a dependent for income tax purposes.

Further the father shall furnish hospitalization and medical insurance on the three minor children. The father shall be responsible for any deductible and any medical expenses not covered by said insurance carrier. The mother shall be responsible for prescription drug expenses and routine school physical examinations. The parties shall share equally the expenses for eyecare, glasses, contact lenses, and orthodontia expenses. The routine dental expenses shall be the responsibility of the father. The custodian shall choose the dentists and physicians of the children. The Court will not order private school

education. This matter will have to be determined by the parties themselves.

V.

The Court further finds that the wife is in need of rehabilitative alimony and orders that the husband shall pay to the wife the sum of seven hundred fifty dollars ($750.00) per month for a period of five years.

VI.

The Court finds the inherited property of the wife being silver, silverware and jewelry of her mother's if not claimed by her father shall be her sole and separate property. Further all gifts of the parties to one another in the form of jewelry, etc., shall remain the recipient's sole and separate property clear of any claim of the other. Further all personal property of the parties brought into the marriage shall

remain the property of the party to which it belonged.

VII.

Insofar as a division of the assets of this marital estate is concerned the Court makes the following division after considering all the proof and weighing the evidence as to values of assets, tax consequences if liquidated and after considering the requirements of division considerations as set forth by T.C.A. 36-4-121:

1.) The wife is awarded the homeplace located at 410 Meadowcrest Circle, Memphis, Tennessee subject to the first mortgage thereon. Any right, title or interest the husband has therein is divested from him and reinvested in the wife to be hers absolute. The husband shall pay <u>as further property division</u> the second mortgage balance on said home with National Bank of Commerce. In the event the wife elects to sell said home before the husband pays off the second mortgage and

if the same is satisfied from her equity in said home, the husband shall pay to her the amount paid to the second mortgage holder. When the husband pays the second mortgage on a month to month basis he shall pay the same timely with no late fees. The wife shall be held harmless on the second mortgage debt.

2.) The wife is awarded the household furniture, furnishings and appliances located in the homeplace.

3.) The wife is awarded her 1987 Honda Accord automobile.

4.) The wife is awarded the Peter Max Paintings, and Salvadore Dali Lithograph.

5.) The wife is awarded the following bank accounts, IRA's Stocks and Mutual Funds listed hereafter with their approximate values:

A.) Bank account, First Tennessee in name of Leslie Cohn (checking) Balance - $1,158.63
B.) J.C. Bradford IRA - $765.00
C.) T. Rowe Price (International Stock Fund) IRA - $2,250.44

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D.) T. Rowe Price (New Horizon IRA) - $2,301.62

E.) Walmart 10 shares - $306.25

F.) 20th Century Growth Investors 85 shares - $1,012.04

G.) Kemper Money Market Funds - $357.04

6.) The wife shall remain the owner of the $150,000.00 New York Life Insurance Policy on the life of the wife and she may designate her beneficiary or beneficiaries thereunder.

7.) The wife shall be Trustee of the children's accounts, savings bonds, coins and other gifts with exception of the mutual funds and money market funds held by the husband as trustee.

8.) The wife is awarded all wedding gifts of the parties. She is awarded any gifts of jewelry and her furs.

9.) The condominium located at 1950 Allenby Road, Germantown, Tennessee is awarded to the husband subject to the mortgage thereon.

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10.) The husband is awarded the household furniture, furnishings and appliances located in the Allenby Road residence.

11.) The husband is awarded the 1984 Honda automobile.

12.) The husband is awarded the following bank accounts, IRA's Stocks, and limited partnerships:

A.) Boatman Bank Checking Account
B.) Stocks in his name $24,000.00.
C.) 20th Century Investors Growth Medical Fund - $5,000.00
D.) Limited Partnerships (Carlyle, T. Rowe Price Realty Fund II; T. Rowe Price Realty Fund III)
E.) IRA's in husband's name.

13.) The husband is awarded his law practice, including books, equipment, accounts receivable and goodwill free and clear of any claim of the wife.

14.) The vacant lot owned by the parties at Harwood Cove, Memphis, Tennessee shall be sold and after payment of the expenses of

sale and the first mortgage thereon, the equity shall be divided equally between the parties. The husband shall pay the mortgage note until the sale and shall be reimbursed one-half of the total paid at the closing.

15.) The life insurance policies in effect at the time of this hearing on the lives of the children shall remain in effect with the husband to pay said premiums thereon.

16.) The husband shall furnish a life insurance policy upon his life in the amount of $250,000.00 naming the wife as beneficiary until the youngest child has reached her majority. Thereafter he may change said beneficiary or cancel said policy.

17.) The jointly held T. Rowe Price International Stock Mutual Fund of $12,000.00 to $15,700.00 shall be divided equally by the parties.

18.) The money held as Trust by the defendant for the minor children under the Irrevocable Trust shall be

accounted for formally by the defendant within 60 days of this Order. If there be any dispute this matter should be addressed by the Chancery Court if litigation is deemed proper.

VIII.

The husband shall pay the following debts on behalf of the wife and children:

1.) Balance of Dr. Maurice Petrovsky, D.D.S. $378.00.
2.) Dr. Howard Jacobson - $180.00
3.) The husband shall be responsible for the payment of the wife's root canal.

IX.

The present health insurance provided by the husband for the wife shall be converted under the Cobra Law for the coverage period provided with the premium to be paid by the husband. After the expiration of said medical coverage, it will be the wife's responsibility to provide her own health and hospitalization insurance.

I

X.

From and after the date of this memorandum neither party shall make any further or other changes upon the credit of the other. The husband shall be responsible for any income taxes due and owing by the parties thru the year 1988 and the wife shall be held harmless thereon.

XI.

The Court finds the attorney for the wife should be awarded a fee to be paid by the husband in the amount of $8,500.00. Any balances due and owing to her attorney of record shall be her responsibility.

The costs of this cause are assessed against the defendant.

The solicitor representing the complainant will prepare an Order accordingly.

I

This the 17th day of October, 1988.

/S/ Muriel Robinson
MURIEL ROBINSON, JUDGE

cc: Honorable Don L. Dowden
Attorney for Plaintiff
Suite 2622 Clark Tower
5100 Poplar Avenue
Memphis, Tennessee 38137

Honorable Don G. Owens, III
Attorney for Defendant
214 Adams Avenue
Memphis, Tennessee 38103

Honorable Henry L. Klein
Attorney for Third Party
770 Estate Place
Memphis, Tennessee 38119

APPENDIX II

IN THE CHANCERY COURT
OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

LESLIE ANN COHN,

PLAINTIFF,

VS NO. D-15875-II

WILLIAM A. COHN,

DEFENDANT/CROSS-PLAINTIFF

VS

RALPH S. SHANKMAN,

CROSS-DEFENDANT

FINAL DECREE OF ABSOLUTE DIVORCE

This cause came on for hearing on the 25th day of August, 1988 before the Honorable Muriel Robinson, Judge of the Fourth Circuit Court of Davidson County, Tennessee sitting by designation of the Supreme Court for these proceedings. The matter was heard upon the original complaint

for divorce filed by the plaintiff-wife, Leslie Ann Cohn, personal service of process had upon the defendant-husband, William Allan Cohn, answer filed by said defendant, and petition for custody filed by the defendant-husband.

In addition, there were various motions filed with the Court and a third party complaint against the maternal grandfather of the minor children, to wit, Mr. Ralph S. Shankman, with answer filed thereto. The matter was heard in open Court with testimony of the principals, other witnesses, argument of counsel submitted to the Court by post-trial written memorandum of each counsel dated September 14, 1988 and September 27, 1988 respectively, and the entire record in this cause including a petition for contempt and sanctions filed against the plaintiff-wife by defendant-husband. From all of which the Court

found and it is accordingly, **ORDERED, ADJUDGED AND DECREED** by the Court:

I.

That all pending motions in this cause are hereby dismissed for failure of movant to set the same for hearing except as specified hereafter. The Petition for Contempt and Motion for sanctions and Rule 11 Motion filed against the wife by the husband are dismissed. The proof presented in these matters do not substantiate a finding of contempt. Further the petition filed against the third party defendant, Mr. Ralph S. Shankman, is hereby dismissed at the cost of the husband. The Court feels the above petition was frivolous, had no basis in fact or law, was malicious in nature and would be subject to Rule 11 sanctions. Therefore, as this pleading was authorized by the husband, William Allan Cohn, being a member of the bar and signed

II

by him, the Court orders that he shall pay a reasonable attorney's fee to Mr. Shankman's attorney of record, Henry L. Klein, in the amount of five thousand dollars ($5,000.00).

II.

The Court, having reviewed all the evidence, finds that a divorce should be awarded in this matter. Therefore the wife, Leslie Ann Shankman Cohn, shall be awarded an absolute divorce from the defendant-husband, William Allan Cohn, upon the grounds of cruel and inhuman treatment and adultery and she is hereby restored to all the rights and privileges of an unmarried person.

III.

This Court further finds that it is to the best interest and welfare of the three minor children of these parties, to wit, Ariel Moshe Cohn, Aaron Jacob Cohn and Barbara Sharon Cohn, that their custody be

awarded to the complainant and natural mother, Leslie Ann Shankman Cohn. The defendant father shall be awarded reasonable visitation as follows: every other weekend from Friday and 6:00 P.M. until Sunday at 6:00 P.M. and Wednesday afternoon of each week from 5:00 P.M. to 8:30 P.M.

The parties shall alternate the children's spring vacation each year and shall alternate all the Jewish holidays and other holidays. The maternal grandparent, Ralph S. Shankman, shall be entitled to see and visit and have with him his grandchildren in compliance with the grandparent visitation provisions of T. C. A. - 36-6-201 with said visits during the time the children are in the care of the mother.

The father shall have extended summer visitation with the children for the month of July and the first two weeks of August each summer. The mother shall visit the

middle weekend of July and every other Wednesday night during this summer visit.

Each party is allowed to phone the children at reasonable times and places but are warned not to make a nuisance of themselves in this regard. The parties are ordered to conduct themselves properly during phone conversations and shall treat each other with respect and politeness so that their children will not be subjected to further trauma.

The Court feels it is necessary to enjoin and restrain the parties herein from attempting to alienate the affections of these children from the other and each parent is further enjoined from making any derogatory remarks about each other or family friends or relatives in the presence of the children.

IV.

The father shall pay to the mother the sum of one thousand five hundred dollars

($1,500.00) per month as child support for the maintenance of the minor children. Said amount shall not be reduced or pro rated without approval of the Court. For the month of July during the extended summer visitation the child support amount shall be reduced to seven hundred fifty dollars ($750.00) however, the full amount shall be paid for the month of August. The father shall be allowed to claim the two older children as dependents and the mother will be allowed to claim the younger child as a dependent for income tax purposes.

Further, the father shall furnish hospitalization and medical insurance on the three minor children. The father shall be responsible for any deductible and any medical expenses not covered by said insurance carrier. The mother shall be responsible for prescription drug expenses and routine school physical examinations.

II

The parties shall share equally the expenses for eyecare, glasses, contact lenses, and orthodontia expenses. The routine dental expenses shall be the responsibility of the father. The custodian shall choose the dentists and physicians of the children. The Court will not order private school education. This matter will have to be determined by the parties themselves.

V.

The Court further finds that the wife is in need of rehabilitative alimony and orders that the husband shall pay to the wife the sum of seven hundred fifty dollars ($750.00) per month for a period of five years.

VI.

The Court finds the inherited property of the wife being silver, silverware and jewelry of her mother's, if not claimed by her father, shall be her sole and separate

property. Further, all gifts of the parties to one another in the form of jewelry, etc., shall remain the recipient's sole and separate property clear of any claim of the other. Further, all personal property of the parties brought into the marriage shall remain the property of the party to which it belonged.

VII.

Insofar as a division of the assets of this marital estate is concerned, the Court makes the following division after considering all the proof and weighing the evidence as to values of assets, tax consequences if liquidated and after considering the requirements of division considerations as set forth by T.C.A., 36-4-121:

1. The wife is awarded the homeplace located at 410 Meadowcrest Circle, Memphis, Tennessee subject to the first mortgage thereon. Any

right, title or interest the husband has therein is divested from him and reinvested in the wife to be hers absolute. The husband shall pay as further property division the second mortgage balance on said home with National Bank of Commerce. In the event the wife elects to sell said home before the husband pays off the second mortgage and if the same is satisfied from her equity in said home, the husband shall pay to her the amount paid to the second mortgage holder. When the husband pays the second mortgage on a month to month basis he shall pay the same timely with no late fees. The wife shall be held harmless on the second mortgage debt.

2. The wife is awarded the household furniture, furnishings and appliances located in the homeplace.

3. The wife is awarded her 1987 Honda Accord automobile.

4. The wife is awarded the Peter Max Paintings, and Salvadore Dali Lithograph.

5. The wife is awarded the following bank accounts, IRA's Stocks and mutual funds listed hereafter with their approximate values:

a. Bank account, First Tennessee in name of Leslie Cohn (checking) Balance - $1,158.63;
b. J.C. Bradford IRA - $765.00;
c. T. Rowe Price (International Stock Fund) IRA - $2,250.44;
d. T. Rowe Price (New Horizon IRA) - $2,301.62;
e. Walmart 10 shares - $306.25;
f. 20th Century Growth Investors 85 shares - $1,012.04;
g. Kemper Money Market Funds - $357.04.

6. The wife shall remain the owner of the $150,000.00 New York Life Insurance Policy on the life of the wife and she may designate her beneficiary or beneficiaries thereunder.

7. The wife shall be Trustee of the children's accounts, savings bonds, coins and other gifts with exception of the mutual funds and money market funds held by the husband as trustee.

8. The wife is awarded all wedding gifts of the parties. She is awarded any gifts of jewelry and her furs.

9. The condominium located at 1950 Allenby Road,

Germantown, Tennessee is awarded to thehusband subject to the mortgage thereon.

10. The husband is awarded the household furniture, furnishings and appliances located in the Allenby Road residence.

11. The husband is awarded the 1984 Honda automobile.

12. The husband is awarded the following bank accounts, IRAs, stocks, and limited partnerships:

    a. Boatman Bank checking account;
    b. Stocks in his name $24,000.00;
    c. 20th Century Investors Growth Medical Fund - $5,000.00;
    d. Limited Partnerships (Carlyle, T. Rowe Price Realty Fund II; T. Rowe Price Realty Fund III);
    e. IRAs in husband's name.

13. The husband is awarded his law practice, including books, equipment, accounts receivable and goodwill free and clear of any claim of the wife.

14. The vacant lot owned by the parties at Harwood Cove, Memphis, Tennessee shall be sold and after payment of the expenses of sale and the

II

first mortgage thereon, the equity shall be divided equally between the parties. The husband shall pay the mortgage note until the sale and shall be reimbursed one-half of the total paid at the closing.

15. The life insurance policies in effect at the time of this hearing on the lives of the children shall remain in effect with the husband to pay said premiums thereon.

16. The husband shall furnish a life insurance policy upon his life in the amount of $250,000.00 naming the wife as beneficiary until the youngest child has reached her majority. Thereafter he may change said beneficiary or cancel said policy.

17. The jointly held T. Rowe Price International Stock Mutual Fund of $12,000.00 to $15,700.00 shall be divided equally by the parties.

18. The money held as Trust by the defendant for the minor children under the Irrevocable Trust shall be accounted for formally by the defendant within 60 days of this Order. If there be any dispute this matter should be addressed by the Chancery Court if litigation is deemed proper.

II

VIII.

The husband shall pay the following debts on behalf of the wife and children:

1. Balance of Dr. Maurice Petrovsky, D.D.S. $378.00;
2. Dr. Howard Jacobson - $180.00;
3. The husband shall be responsible for the payment of the wife's root canal.

IX.

The present health insurance provided by the husband for the wife shall be converted under the Cobra Law for the coverage period provided, with the premium to be paid by the husband. After the expiration of said medical coverage, it will be the wife's responsibility to provide her own health and hospitalization insurance.

X.

From and after the date of this memorandum neither party shall make any further or other charges upon the credit of

the other. The husband shall be responsible for any income taxes due and owing by the parties thru the year 1988 and the wife shall be held harmless thereon.

XI.

The Court finds the attorney for the wife should be awarded a fee to be paid by the husband in the amount of $8,500.00. Any balances due and owing to her attorney of record shall be her responsibility.

The costs of this cause are assessed against the defendant, for which execution may issue, if necessary.

/S/ Muriel Robinson
MURIEL ROBINSON, JUDGE

DATED: October 31, 1988

HONORABLE DON L. DOWDEN
Attorney for Plaintiff

HONORABLE DON G. OWENS, III
Attorney for Defendant

II

HONORABLE HENRY L. KLEIN
Attorney for Third Party Defendant

A TRUE COPY-ATTEST
JOHN C. ROBERTSON, CLERK & MASTER
BY /S/ James Boywell
D.C. & M.

APPENDIX III

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

LESLIE S. COHN, Plaintiff/Appellee, vs. WILLIAM A. COHN, Defendant/Appellant, vs. RALPH SHANKMAN, Third Party Defendant/ Appellee.	)	FILED JUL 12 1990 JEWEL REDDEN, CLERK SHELBY EQUITY NO. 4

From the Chancery Court of Shelby County, Tennessee
The Honorable Muriel Robinson, Chancellor

Don L. Dowden and
Marti L. Kaufman, Memphis
Attorneys for Plaintiff/Appellee

Don G. Owens III, Memphis
Attorney for Plaintiff/Appellant

Henry L. Klein, Memphis
Attorney for Appellee, Ralph Shankman

Opinion Filed: Jul 12 1990

AFFIRMED AS MODIFIED

HIGHERS, J.

TOMLIN, P.M., W.S. (Concurs)

FARMER, J. (Concurs)

Leslie Ann Cohn (hereinafter "appellee") filed for divorce from her husband of sixteen years, William A. Cohn (hereinafter "appellant"), in the Chancery Court at Shelby County. While the divorce trial was pending, appellant filed a petition for custody of the parties' three minor children and named his father-in-law, Ralph Shankman, as third party defendant. The petition requested that Shankman be denied visitation rights. The Chancellor granted the divorce in favor of appellee and awarded her custody of the children with appellant being allowed reasonable visitation. Appellant was ordered to pay child support in the amount of $1,500 per month. After dividing the marital property, the court further ordered appellant to pay rehabilitative alimony to appellee in the amount of $750 per month for a period of five years. Appellant's custody petition

was dismissed including the claim against Shankman. The Chancellor ordered appellant to pay $8,500 and $5,000 for appellee's and Shankman's respective legal expenses. Appellant brings this appeal contesting the trial court's award of alimony, division of marital property, and award of attorneys' fees.

The parties have not properly abridged the record in accordance with the Rules of this Court. Rules Ct. App. 14. We have nonetheless reviewed the portions of the record referred to in their briefs. We will limit the facts in this opinion to those which are crucial to making our determination.

The first issue we address is whether the trial court erred in ordering appellant to pay alimony of $750 per month for five years. The General Assembly has declared that alimony shall be rehabilitative in

nature whenever possible. T.C.A. § 36-5-101(d). In her memorandum opinion, the Chancellor found that appellee was in need of rehabilitative alimony and entered an order accordingly.

Appellant contends that his ex-wife is not in need of rehabilitation. We respectfully disagree. During the marriage of the parties, appellant graduated from Memphis State University, attended and graduated from the University of Tennessee School of Law, and has established a successful law practice. In the three years preceding trial, appellant realized net profits of approximately $52,300, $82,200 and $64,500 respectively.

Appellee, on the other hand, was seventeen years old when she married and never obtained a college degree. For several years she has worked part time for her father. This work entailed performing

property management, taking care of the company's financial books and generally helping her father's real estate firm to the extent that she is able. It is necessary, however, for her to work around her children's school schedule. Her children attend three different schools, each beginning and concluding school at different times in the day. She has always undertaken the primary responsibility for taking care of the children, including making certain that they did not disturb their father while he was studying or working. Appellant admits that "while the husband was the primary bread winner, the wife was the primary homemaker."

Appellee does have a real estate license which she has held for approximately three or four years and she occasionally uses it in the performance of her job. The times that she sells real estate are rare,

and in the previous year she sold only two or three parcels of property. Her income is approximately $750 per month before taxes. Appellee has been attending college courses part time for thirteen years with a goal of obtaining a Bachelor of Fine Arts degree in Interior Design. Considering her continuing need to work and care for her family, it will take her seven more semesters to obtain the desired degree. Throughout the marriage, appellant did not want his wife working full time; rather, he wanted her in the home and often discouraged her business pursuits. He would fail to give her important telephone calls and would complain when she was called upon to show properties during his free time.

The propriety of awarding alimony and the amount of the alimony are generally questions left to the discretion of the trial court. We will presume the trial

court's decisions in these matters to be correct unless the evidence preponderates against them. T.R.A.P. 13(d); Luna v. Luna, 718 S.W.2d 673 (Tenn. App. 1986). This is a proper case for rehabilitative alimony and we therefore find appellant's first issue to be without merit.

We are next confronted with the question of whether the trial court erred in its attempt to make an equitable division of the parties' marital property. We have read the Chancellor's Memorandum opinion and it is clear that she considered the enumerated factors set forth in T.C.A. § 36-4-121. The Chancellor had the burden of distributing a substantial amount of marital property, however, and we are in agreement with appellant that the court made errors with respect to two marital assets.

The Chancellor awarded to the husband, as part of his share of the marital property, stocks in his name purportedly

valued at $24,000 and a Twentieth Century Investors Growth Fund purportedly valued at $5,000. Prior to the hearing in this matter, the parties filed affidavits setting forth their individual incomes and expenses pursuant to Rule 14(e) of the Shelby County Local Rules of Practice. Subsequent to the trial, the Chancellor required the parties to submit a statement of assets. Our review of these documents reveals that the Twentieth Century Investors Growth Fund has a value of $500 rather than $5,000 and stock in appellant's name has a value of $2,400, not $24,000. Thus, the portion of the marital estate awarded to appellant is worth substantially less than the Chancellor apparently intended. We believe, therefore, that a modification of the division is in order. As such, we award the entire T. Rowe Price International Stock Mutual Fund to appellant which the record shows to have a

value between $12,000 and $15,700. The Chancellor had divided that asset evenly between the parties. We further award appellant the T. Rowe Price New Horizon IRA which the trial court found to have an approximate value of $2,300. It is the opinion of the Court that these adjustments result in an equitable division of the marital assets.

As to the trial court's award of attorney fees, we believe that there was no error. The record reflects that appellee's legal expenses totaled approximately $22,000 and the Chancellor ordered appellant to pay $8,500 towards appellee's attorney fees with the balance to be the responsibility of appellee. In domestic relations cases, awards for attorney fees are viewed as alimony awards, Gilliam v. Gilliam, 776 S.W.2d 81 (Tenn. App. 1988), and such matters are generally left to the trial

court's discretion. The law in Tennessee, however, is that ordinarily if a spouse is financially capable of paying counsel, then such spouse is not entitled to the award of attorney fees. Ligon v. Ligon, 556 S.W.2d 763 (Tenn. App. 1977). On the other hand, the disadvantaged spouse should not be required to dissipate her income - producing assets to pay her attorney. Lancaster v. Lancaster, 671 S.W.2d 501 (Tenn. App. 1984). The liquidity of the marital assets distributed to appellee is another factor to consider. See Gilliam v. Gilliam, supra.

> Where a court undertakes to fix an amount to be paid by the husband to the wife for payment of her counsel, consideration should be given to the amount of time spent in the representation of client and the usual, recognized, charge for the time spent. Of course, the seriousness of the matter being handled, the experience and reputation of the attorney involved, and other matters mentioned in DR 2-106, Code of Professional Responsibility, are also entitled to consideration.

III

Ligon v. Ligon at 768. The Chancellor acted within her discretion by ordering appellant to pay a portion of appellee's attorney fees and the amount is supported by the evidence.

The Chancellor also ordered appellant to pay a portion of Shankman's attorney fees. In Shankman's answer to appellant's petition seeking to restrain him from visiting with his grandchildren, Shankman filed a counterclaim for attorney fees on the grounds that appellant's petition had no basis in law or fact and was filed for malicious purposes. After a trial on the merits of the entire cause, the Chancellor stated:

> The petition filed against the third party defendant, Mr. Ralph S. Shankman, is hereby dismissed at the cost of the husband. The Court feels the above petition as frivolous, had no basis in fact or law, was malicious in nature and would be subject to Rule 11 sanctions. Therefore, as this pleading was authorized by the husband, William Allan Cohn,

> being a member of the bar and signed by him the Court orders that he shall pay reasonable attorney's fees to Mr. Shankman's attorney of record in the amount of five thousand dollars ($5,000).

Upon our review of the record, we are in full agreement with the Chancellor that appellant's allegations against Shankman are based on neither law nor fact. Appellant raises the question of whether the trial court is authorized to grant sanctions under T.R.Civ.P. 11 without a special hearing on the matter because Shankman did not specifically request sanctions under Rule 11. The trial court acted properly. Shankman requested relief which was in the nature of a Rule 11 sanction and appellant was clearly on notice thereof. The record shows that Shankman incurred more than $9,000 in legal expenses and the court ordered appellant to pay $5,000 towards those expense. The court entered its order

only after a trial on the merits. Even if a party does not seek Rule 11 sanctions, the court may upon its own initiative impose such sanctions. Rule 11 sanctions were warranted in this case and we find this issue to be without merit.

Appellant's final issue is whether he is "entitled to 'present cash value' as to substantial child support payments made by him in advance." He has failed to refer to the record to show us that such payments were made, he does not show where in the record he requested such relief (see Court of Appeals Rule 6), and provides this Court with no legal authority to support his position. We are unable to find any error with regard to this issue.

III

The judgment of the trial court is affirmed as modified. Costs are adjudged against appellant.

/S/ Highers
HIGHERS, J.

/S/ Tomlin
TOMLIN, P.J., W.S.

/S/ Farmer
FARMER, J.

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

LESLIE S. COHN, Plaintiff/Appellee, vs. WILLIAM A. COHN, Defendant/Appellant, vs. RALPH SHANKMAN, Third Party Defendant/Appellee.	)	SHELBY EQUITY NO. 4 FILED JUL 12 1990 JEWEL REDDEN, CLERK

O R D E R

This matter came on to be regularly heard and considered by the Court on the record, and for the reasons stated in the Opinion of the Court, filed this date, it is ordered that:

1. The judgment of the trial court is affirmed as modified.

III

2. Costs are adjudged against the appellant for which execution may issue, if necessary.

ENTERED JUL 12 1980

/S/ Highers
HIGHERS, J.

/S/ Tomlin
TOMLIN, P.J., W.S.

/S/ Farmer
FARMER, J.

APPENDIX IV

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

LESLIE S. COHN, Plaintiff/Appellee, vs. WILLIAM A. COHN, Defendant/Appellant, vs. RALPH SHANKMAN, Third Party Defendant/ Appellee.	)	SHELBY EQUITY NO. 4 FILED JUL 12 1990 JEWEL REDDEN, CLERK

O R D E R

This matter came on to be regularly heard and considered by the Court on the Record, and for the reasons stated in the Opinion of the Court, filed this date, it is ordered that:

1. The judgment of the trial court is affirmed as modified.

2. Costs are adjudged against the appellant for which execution may issue, if necessary.

ENTERED JUL 12 1990

/S/ Highers
HIGHERS, J.

/S/ Tomlin
TOMLIN, J.

/S/ Farmer
FARMER, J.

APPENDIX V

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

LESLIE S. COHN,	)	
	)	
PLAINTIFF/APPELLEE,	)	
	)	
V.	)	Shelby Equity
	)	No. 4
WILLIAM A. COHN,	)	
	)	
DEFENDANT/APPELLANT,	)	FILED
	)	NOV 19 1990
V.	)	JEWEL REDDEN,
	)	CLERK
RALPH SHANKMAN,	)	
	)	
	)	
THIRD PARTY DEFENDANT/APPELLEE.	)	

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be DENIED.

PER CURIAM

V

Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

(2)

No. 90-1295

In The

Supreme Court of the United States

October Term, 1990

WILLIAM A. COHN,

Petitioner,

vs.

RALPH SHANKMAN,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

HENRY L. KLEIN
APPERSON, CRUMP, DUZANE & MAXWELL
One Commerce Square, Suite 2110
Memphis, TN 38103
(901) 525-1711

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the failure to afford a litigant a separate hearing to determine if Rule 11 sanctions should be imposed is a denial of due process.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc., 834 F.2d 833 (9th Cir. 1987) 5

Harmony Drilling Co., Inc. v. Kruetter, 846 F.2d 17 (5th Cir. 1988) 5

International Shopping v. Hydra Offshore, Inc., 875 F.2d 388 (2d Cir. 1989) 6

Jensen v. Federal Fund Bank of Omaha, 882 F.2d 340 (8th Cir. 1989) 5

McLaughlin v. Bradlee, 803 F.2d 1197 (D.C. Cir. 1986) 5

Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied sub nom., County of Suffolk v. Graseck*, 480 U.S. 918, S.Ct. 1373, 94 L.Ed.2d 689 (1987) 6

Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1989) 6

Sanko S.S. Co., Ltd. v. Galin, 835 F.2d 51 (2d Cir. 1987) 5

Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C.Cir. 1985) 6

No. 90-1295

In The

Supreme Court of the United States

October Term, 1990

WILLIAM A. COHN,

Petitioner,

vs.

RALPH SHANKMAN,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Ralph Shankman, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Order of the Supreme Court of Tennessee entered in the above entitled case on November 19, 1990.

STATEMENT OF THE CASE

This case began on November 2, 1987 as a divorce action brought by Leslie Shankman Cohn against Petitioner William A. Cohn in the Chancery Court of Shelby

County, Tennessee. Petitioner filed an answer and, at a later date, filed a third party complaint against Respondent, Ralph Shankman, the father of Leslie Shankman Cohn, seeking to place restrictions on Respondent's visitation rights with Petitioner's minor children. Respondent filed an answer to the third party complaint and a counterclaim alleging that the relief sought by Petitioner in the form of an injunction and restraining order was without basis in fact or law and was malicious in nature. The counterclaim sought an award of costs, expenses and attorneys' fees.

At trial, the proof showed that Respondent had been generous in financially assisting his daughter and Petitioner during their marriage. Witnesses for both Petitioner and his wife, including Petitioner's own mother and one of his former law associates testified that Respondent was a good and loving grandfather who had a genuine interest in the welfare of his grandchildren. Although Petitioner, in his testimony expressed concern about his children being around some of Respondent's friends because of their so-called lifestyle, there was nothing in the record to indicate that any of these friends, who were well-to-do businessmen and friends of both Respondent and his wife, had done anything unusual around the children. Petitioner conceded at trial that at no time during the marriage and before the separation did he voice any objections regarding the children being around Respondent or any of his friends. It was only after the separation that Petitioner made threats to his wife about Respondent's friends and subpoenaing them to Court.

At the close of Petitioner's proof, the trial judge granted Respondent's motion to dismiss finding that there was no evidence that the children had been exposed to anyone's life style that was inappropriate or that there had been any misconduct on the part of Respondent. Pursuant to Respondent's counterclaim, the Court instructed counsel to submit an affidavit for attorneys fees.

Following the trial which took place on August 25 and 26, 1988, the Court filed its memorandum decision on October 17, 1988 confirming that the third party action against Respondent should be dismissed, and holding that it was frivolous, had no basis in fact or law, was malicious in nature and would be subject to Rule 11 Sanctions. The Court further found that since the pleading was authorized by Petitioner who was a member of the bar and signed by him, he was ordered to pay attorneys' fees in the amount of $5,000. A final decree was entered on October 31, 1988.

Petitioner appealed the final decree to the Court of Appeals of Tennessee raising the questions of notice and denial of the opportunity to be heard on the Rule 11 sanctions. Petitioner cited no authorities in support of his position. The Court of Appeals affirmed the trial court, finding that there was no basis in fact or law for Petitioner's allegations against Respondent and that sanctions should be imposed. The Court of Appeals further held that Petitioner was on notice of the relief sought which was in the nature of Rule 11 sanctions and that the trial court entered its order only after a trial on the merits.

Petitioner then filed an application for permission to appeal to the Supreme Court of Tennessee raising the same issues. Again Petitioner cited no authorities. On November 19, 1990, the Supreme Court denied the application.

REASONS FOR DENYING THE WRIT

Since the order of the Tennessee Supreme Court denying Petitioner's application for permission to appeal the findings of the Tennessee Court of Appeals is correct and conflicts with no decision of this Court, further review by this Court is not warranted.

Petitioner contends that he should have been given notice that the trial court was considering imposing Rule 11 sanctions and accordingly afforded a meaningful opportunity to be heard. He maintains that if given notice and an opportunity to be heard *in camera*, "he would have explained his conduct and would have presented proof of facts and circumstances from privileged files, work product and otherwise, which while not necessarily relevant to the issues at trial, would have shown that Petitioner's third party complaint had a solid basis in both fact and law." (Petition for Writ of Certiorari pps. 13-14). The trial lasted two days. Petitioner had ample opportunity to introduce proof regarding his third party action against Respondent. It is not clear what is meant by "privileged files" and "work product" in the context of this case. Furthermore, it is difficult to understand why this proof would be relevant in a Rule 11 sanctions hearing and not

the trial itself, and why it was not introduced at the trial either *in camera* or otherwise.

There have been several cases dealing with the issue of notice and a hearing in connection with Rule 11 sanctions. Some courts have held that the imposition of sanctions without affording prior notice and a meaningful opportunity to be heard is a denial of due process. *Jensen v. Federal Fund Bank of Omaha*, 882 F.2d 340, 341 (8th Cir. 1989); *Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 836 (9th Cir. 1987); *Sanko S.S. Co.. Ltd. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987).

To the contrary, other Courts have held that the right to notice and a hearing depends on the circumstances of the case. In *Harmony Drilling Co., Inc. v. Kruetter*, 846 F.2d 17, 19 (5th Cir. 1988) the court found that not all cases required the giving of notice before applying Rule 11 sanctions. While the courts may be split on the notice requirement, Respondent submits this is not an issue in the case at hand. From the outset, Petitioner knew from Respondent's counterclaim to the third party complaint that Respondent was contending that the action was without basis in fact or law, was malicious in nature and that he was entitled to attorneys' fees. The Tennessee Court of Appeals specifically found that Respondent's "requested relief was in the nature of a Rule 11 sanction" and Petitioner "was clearly on notice thereof". (Opinion of Court of Appeals of Tennessee).

With regard to a hearing, the Court in *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986) held that the scope of the sanction proceedings was limited to the

record. This was based in part upon the advisory committee's note to the 1983 amendment to Rule 11 and also the fact that the offending party offered no basis for any further proceedings on the matter. See also *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986), *cert. denied sub nom., County of Suffolk v. Graseck*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987) (where the Court rejected the notion that an evidentiary hearing was required to impose Rule 11 sanctions); *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205-06 (7th Cir. 1985) (hearing not required under the circumstances); *International Shopping v. Hydra Offshore, Inc.*, 875 F.2d 388, 392 (2d Cir. 1989) (evidentiary hearing not required to impose sanctions for failing to conduct proper inquiry into subject matter jurisdiction); *Westmoreland v. CBS. Inc.*, 770 F.2d 1168, 1178 (D.C. Cir. 1985) (concluding that due process satisfied where parties had opportunity to brief issue of sanctions on appeal).

Rule 11 and the advisory committee's note contemplate that courts should be given latitude in determining if a separate hearing should be afforded the offending party prior to imposing sanctions. To the extent possible, the inquiry should be limited to the record. Petitioner had ample opportunity to support his case at trial. He had his day in court. Under the circumstances, Petitioner is not entitled to another hearing. As the Court concluded in McLaughlin, while it is conceivable that due process would require a hearing in certain cases, here Petitioner offers no basis for any further proceedings. 803 F.2d at 1205.

The Tennessee Supreme Court's Order is in accord with applicable decisions of this Court and there are no

special or important reasons warranting briefs on the merits and oral arguments in this matter.

CONCLUSION

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

HENRY L. KLEIN
APPERSON, CRUMP, DUZANE & MAXWELL
One Commerce Square, Suite 2110
Memphis, TN 38103
(901) 525-1711

Attorney for Respondent